83-1352

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No.

IN THE

# Supreme Court of the United States

October Term, 1983

Neil E. Bischoff, et al.,
*Appellants*

v.

City of Austin,
*Appellee*

ON APPEAL FROM THE COURT OF APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

## JURISDICTIONAL STATEMENT

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## QUESTION PRESENTED

Whether a ballot in a municipal revenue bond election which instructed the electors to vote FOR or AGAINST the following proposition was, as framed, so misleading as to deprive the electors of their constitutional right to vote under Amend. XIV, §1, and §4 of Article IV of the U. S. Constitution:

> THE ISSUANCE OF $97,000,000 REVENUE BONDS FOR ELECTRIC LIGHT AND POWER SYSTEM EXTENSIONS AND IMPROVEMENTS (CONTINUED FINANCING THROUGH MARCH 1984 OF THE CITY'S PARTICIPATION IN THE SOUTH TEXAS PROJECT TO AVOID LEGAL COMPLICATIONS AND TO PROTECT THE CITY'S FINANCIAL INTEREST, INCLUDING THE RIGHT TO SELL ITS INTEREST THEREIN). (Bold emphasis added)

## PARTIES

In accordance with Rule 15(b), Appellants list the names of all parties to their knowledge as follows: Appellants include Neil E. Bischoff, David Weir, Joseph M. Riddell, III, David Soileau, and Mark Zuefeldt. Appellee is the City of Austin, Travis County, Texas.

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## OPINION BELOW

The opinion of the Court of Appeals for the Third Supreme Judicial District of Texas at Austin appears at 656 S.W.2d 209.

## JURISDICTION

This is an appeal of an election contest in which the validity of the form of a ballot prescribed by a municipal ordinance has been challenged as being repugnant to the Constitution of the United States. The judgment of the Texas Court of Appeals is in favor of the validity of the ordinance and ballot prescribed therein.

The Court of Appeals rendered its judgment in this cause on July 13, 1983. Copies of the judgment and written opinion are reproduced as Appendices D and A, respectively, in the appendices filed herewith (hereinafter cited as "App."). A timely motion for rehearing was filed and overruled on September 7, 1983. (App. E) A timely Application for Writ of Error was filed with the Supreme Court of Texas. The Supreme Court of Texas refused to issue the Writ on October 19, 1983. (App. F) A timely motion for rehearing was filed with the Supreme Court of Texas and overruled on November 16, 1983. (App. F) At that time, the judgment of the Court of Appeals, of which we complain, became final under state law. A Notice of Appeal to the Supreme Court of the United States was filed in the Court of Appeals on February 9, 1984. (App. G)

This Court has jurisdiction to review the judgment of the Texas Court of Appeals by virtue of 28 USC 1257(2). A local ordinance is deemed a state statute for purposes of invoking this Court's jurisdiction under 28 USC 1257(2). *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

## CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCE AND RULE INVOLVED

1. U.S. CONSTITUTIONAL AMENDMENT XIV, SECTION 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. U.S. CONSTITUTION, SECTION 4, ARTICLE IV provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

3. TEXAS ELECTION CODE, Article 6.07, Subdivision 3 provides:

> The form in which any proposition or question to be voted on by the people of any city, county or other subdivision of the State shall be submitted, unless prescribed by statute, city charter, or ordinance, shall be prescribed by the local or municipal authorities submitting it.

4. TEXAS ELECTION CODE, Article 9.30 provides:

> If the contest be for the validity of an election held for any other purpose than the election of an officer or officers in any county or part of a county or precinct of a county, or in any incorporated city, town, or village, any resident of such county, precinct, city, town, or village, or any number of such residents, may contest such election in the district court of such county in the same manner and under the same rules, as far as applicable, as are prescribed in this chapter [arts. 9.01 – 9.38] for contesting the validity of an election for a county office.

5. CITY OF AUSTIN ORDINANCE No. 821216–I, provides in pertinent part:

> That the official ballots for said election shall be prepared in accordance with the V.A.T.S. Election Code so as to permit the electors to vote "FOR" or "AGAINST" the aforesaid propositions which shall be set forth in substantially the following form:

PROPOSITION NUMBER 1

THE ISSUANCE OF $97,000,000 REVENUE BONDS FOR ELECTRIC LIGHT AND POWER SYSTEM EXTENSIONS AND IMPROVEMENTS (CONTINUED FINANCING THROUGH MARCH, 1984, OF THE CITY'S PARTICIPATION IN THE SOUTH TEXAS PROJECT TO AVOID LEGAL COMPLICATIONS AND TO PROTECT THE CITY'S FINANCIAL INTEREST, INCLUDING THE RIGHT TO SELL ITS INTEREST THEREIN).

6. TEXAS RULES OF CIVIL PROCEDURE, Rule 329b (c) and (d), provides:

> (c) In the event an original or amended motion for new trial is not determined by written order signed within seventy-five days after the judgment is signed, it shall be considered overruled by operation of law on expiration of that period.
>
> (d) The trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed.

## STATEMENT OF THE CASE

This cause originated in the 126th Judicial District Court of Travis County, Texas, Judge Pete Lowry presiding, as an election contest pursuant to the Texas Election Code, Article 9.30, quoted above.[1] Trial was before the court without a jury on an agreed Stipulation of Facts. (P.Ex. 1) The sole question presented below and before this Court, is a challenge to the language used in submitting a revenue bond proposition to the voters.

According to the stipulation, the City of Austin is one of four participants in a project to construct a nuclear power plant known as the South Texas Project. On December 16, 1982, the City Council adopted an Ordinance No. 821216-I which set out a proposition to be submitted to the voters on January 15, 1983. The City of Austin held an election pursuant to the ordinance at which the voters were asked to vote FOR or AGAINST the following proposition as stated on the Official Ballot (P.Ex. 1):

[1]The case was consolidated with a declaratory judgment action filed by the City of Austin as part of legal maneuvering below not relevant here.

THE ISSUANCE OF $97,000,000 REVENUE BONDS FOR ELECTRIC LIGHT AND POWER SYSTEM EXTENSIONS AND IMPROVEMENTS (CONTINUED FINANCING THROUGH MARCH 1984 OF THE CITY'S PARTICIPATION IN THE SOUTH TEXAS PROJECT TO AVOID LEGAL COMPLICATIONS AND TO PROTECT THE CITY'S FINANCIAL INTEREST, INCLUDING THE RIGHT TO SELL ITS INTEREST THEREIN). (Bold emphasis added)

The language objected to by Appellants is in boldface for the convenience of the Court. The language of the ballot is identical to the form of the ballot specified in the ordinance calling the election.

The parties have stipulated that prior to the election, in November, 1982, the City Council of the City of Austin had caused to be prepared a document in which various alternative methods to finance the so-called "South Texas Project" are discussed, including:

1. Raising utility rates to pay-as-you-go;
2. Bond financing, including:
   a. Certificates of obligation,
   b. Joint Austin–San Antonio bonds, or
   c. Revenue bonds of the City of Austin.

Furthermore, at a City Council meeting in December, 1982, the Mayor of Austin attempted to have a second proposition added to the ballot asking whether the voters wished to raise utility rates to finance the project. The Mayor's proposal was not adopted by the council. What is most important about all this is that the undisputed evidence at trial shows that at the time the proposition as stated was submitted to the voters of Austin, there existed at least three alternatives to the proposed revenue bonds for financing the "South Texas Project," namely:

a. Joint San Antonio–Austin bonds;
b. Raising utility rates; or
c. Certificates of Obligation.

Also contained in the Stipulation are examples of propositions submitted by the City of Austin in previous years, some concerning this very project. As an example, in an election held on September 9, 1972, an issue relating to bonds for the "South Texas Project" was submitted asking the voters to vote FOR or AGAINST the following:

> THE ISSUANCE OF $289,260,000 REVENUE BONDS FOR ELECTRIC LIGHT AND POWER SYSTEM EXTENSIONS AND IMPROVEMENTS (NUCLEAR POWER PLANT GENERATION).

As a second example, at an election held on April 7, 1979, an issue for continued participation in this same project was submitted as:

> THE ISSUANCE OF $215,850,000 REVENUE BONDS FOR ELECTRIC LIGHT AND POWER SYSTEM EXTENSIONS AND IMPROVEMENTS [Continuing Full Participation (16%) in the South Texas Project (NUCLEAR) including Nuclear Fuel in Process and in Stock Therefor].

What is most important here is to know that the public officials who were responsible for drafting the ballot used on January 15, 1983, had an appreciation for the traditional submission of such revenue bond proposals in clear, simple, plain language in a fair and impartial manner.

The Charter of the City of Austin is Exhibit F to the Stipulation. Section 11 of Article VII thereof authorizes the issuance of revenue bonds for certain specified purposes. The authorized purposes are "constructing, purchasing, improving, extending, or repairing public utilities, recreational facilities, or facilities for any other self liquidating municipal function."

Preservation of Federal Question:

As this Court may be aware, Texas practice in this case, as in most civil cases, provides for an appeal by right to the

appropriate Court of Appeals, and then for discretionary review of the Court of Appeals decision in the Supreme Court of Texas by application for writ of error. Your Appellants have exhausted these State remedies in this cause. It will be necessary, however, to include a discussion of the preservation of the federal question by proper pleading in the trial court since the Court of Appeals opinion, without discussion, suggests that the federal question may not be "properly before it." It is important, however, that the Court of Appeals in its opinion does reach and decide the federal question adverse to Appellants.

The parties went to trial on Plaintiffs' First Amended Original Petition, a copy of which is included as Appendix H to this appeal. In that trial court pleading, Appellants set forth a number of allegations challenging the objectionable language on the ballot, including assertions that the ballot language did not state the question to be voted on with definiteness and certainty, that the language did not fairly and impartially state the measure to be voted upon, that the language used amounted to argument, that the language did not state a specific question capable of being answered by the voters, and that it was generally misleading and confusing to the voters. On April 18, 1983, the trial judge entered judgment upholding the validity of the election. A copy of that judgment is included as Appendix B.

On May 5, 1983, the undersigned attorney hand delivered to Judge Lowry the letter and Motion to Vacate Judgment included as Appendix I. The Motion to Vacate appears in the record in the Second Supplemental Transcript. On page 13 of the letter, Judge Lowry is specifically cited to *Burger v. Judge*, 364 F.Supp. 504 (D. Montana 1973) and a copy of the opinion given to him. Item number 5 in the Motion to Vacate specifically cites to Amendment XIV, Section 1 and Section 4, Art. IV of the U. S. Constitution. The motion was overruled by operation of law 75 days after May 5, 1983, pursuant to Rule 329b(c) of the Texas Rules of Civil Procedure.

In their brief in the Court of Appeals your Appellants stated and briefed five points of error, including point five which read as follows:

> The trial court erred in rendering judgment confirming the validity of the election of January 15, 1983, for the reason that the misleading language used on the ballot constitutes a violation of the rights of the voters protected by both Article IV and the Fourteenth Amendment to the Constitution of the United States.

In its written opinion, the Court of Appeals at first indicates that the issues might not be before that court because "that contention was not raised in appellants' trial pleading." However, by footnote the Court of Appeals does note that the contention was raised to the trial court in the Motion to Vacate Judgment. Of course, the "contention" that the ballot language was misleading and confusing to the voters was at the heart of the original and amended petitions in the trial court. Oral argument centered around the valuable right to vote in this country and effective denial of that right by use of confusing, ambiguous, and biased language on the ballot.

The Court of Appeals cites to *Gray-Taylor u. Tennessee*, 587 S.W.2d 668 (Texas 1979) in support of the rule that "contentions raised for the first time on appeal are not properly before the appellate court." That case involved a challenge to a retail installment contract under the Federal Truth in Lending Act. Petitioner in that case tried to raise for the first time in the Texas Supreme Court a challenge to language in the document not even previously challenged and to complain of an omission not previously challenged, both of which were wholly unrelated to the challenges actually tried in either the trial court or the court of appeals. That case is hardly authority for this one. Here the very same language was challenged in our trial court petition for the very same reason (misleading the voters) as stated in the federal question. Moreover the applicable federal authority was cited to the trial court in a Motion to Vacate Judgment at a time when the trial judge still had jursidiction to set aside the judgment: Rule 329b(d), Texas Rules of Civil Procedure. (Remember also that the case was tried to the court on a stipulated set of facts so the only trial Judge Lowry ever heard was argument of counsel on the law.)

Judge Lowry definitely had the federal question before him.

As further proof of that, we include a copy of a letter dated May 9, 1983, from the First Assistant City Attorney addressed to Judge Lowry which specifically references the letter of May 5, 1983, from the undersigned attorney to Judge Lowry. (App. J) Also included as Appendix C is a letter dated May 11, 1983, from Judge Lowry to the attorneys of record in the case enclosing the court's Findings of Fact and Conclusions at Law. Please note that the letters of May 5 and May 9 described above were arguments of counsel on the appropriate Findings and Conclusions so that Judge Lowry necessarily read the letter of May 5 before signing his Findings and Conclusions on May 11.

Furthermore, the Texas Supreme Court has recognized exceptions to the rule that contentions cannot be raised for the first time on appeal, and specifically with regard to election contests. In *Bucholtz Independent School District v. Glaser*, 632 S.W.2d 146 (Texas 1982), a school bond election was challenged. The court held that disqualification of a judge on state constitutional grounds is fundamental error which can be raised for the first time at any stage of the proceedings. In that case, the court decided that a statutory disqualification was involved rather than a constitutional disqualification. The contention had been raised for the first time in a motion for rehearing in the court of appeals. The Texas Supreme Court states in its opinion that the taxpayers there "failed to assert the claimed error by a point on appeal." Presumably then a point on appeal would be sufficient to preserve even a statutory disqualification. Certainly, a point in a Motion to Vacate Judgment in the trial court would suffice!

This Court in *Meyer v. City of Richmond*, 172 U.S. 82 (1898) dealt with a situation similar to that presented here. However, in the *Meyer* case, the plaintiff did not raise his federal question until a *second* motion to set aside the judgment in the trial court. In concluding that it had jurisdiction of the federal question, the Court noted (at 93-94) that, "the constitutional right was claimed in such manner as to bring it to the attention of the lower court, and its decision was necessarily adverse to such right. . . . [I]t was reasserted in the assignment of errors to the higher court, and . . . the effect of the judgment was to declare the right not infringed by the proceedings in the

case." Also discussed in that opinion are two prior cases, *Loeber v. Schroeder*, 149 U.S. 580 (1893) and *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897), in which it was implied that the federal question would have been claimed in time had it been raised before the decision in the appellate court.

Appellants included the identical point five in their Motion for Rehearing in the Court of Appeals and in their Application for Writ of Error to the Texas Supreme Court. The same law and pertinent cases were discussed in the brief to the Texas Supreme Court under the point and the point was raised in the Motion for Rehearing in that Court.[2]

## IMPORTANCE OF QUESTION

This case presents a substantial constitutional question which has been of apparently little concern to the State courts that have heard it thus far.

It is important to first point out that the common law arguments and the constitutional argument are much the same, if not identical. We are dealing with basic requirements of fairness in the election process. Is the State required to phrase its propositions so that they can be understood by the common voter? Can the State ask several questions in a single proposition so as to get a "Yes" vote from almost everybody? Can the officials who draft a ballot add-on argument to persuade the voter to approve a bond issue? The answers are obvious and yet neither the trial court in its judgment and findings and conclusions nor the Court of Appeals in its written opinion deem the questions even worthy of their deliberation and analysis. Why not? It is submitted that the courts cannot rationalize their result on paper and thus could only handle these important issues, as they did, in a perfunctory and cavalier manner.

For example, the Court of Appeals, after stating the facts and our contentions rather well in the first portion of the opinion, polishes them off by saying the framing of the proposition was "properly left to the discretion of the

[2]Appendices E and F set out the orders disposing of the Motions and the Application.

municipal authorities". Since that court was not cited to a Texas case where a ballot said "too much," it concludes that one cannot ever say "too much" on a ballot. Then, the Court declares that the language "to avoid legal complications" and "to protect the City's financial interest including the right to sell its interest therein" served to explain the phrase "electric light and power system extensions and improvements." It is obvious that such cannot be so. What does "avoiding legal complications" have to do with an electric power plant? It is obvious that the objectionable phrase was meant to describe the result of a FOR vote, and did not describe the capital improvement to be built. It is submitted that the phrase had no other purpose than to mislead the voters of Austin.

It is curious that the Court of Appeals, when confronted with our argument that if the objectionable language did indeed state a purpose for the bonds then it was for a purpose not authorized by law, declared:

> The point of error is without merit because avoiding legal complications and preserving the City's interest in the project, if indeed purposes of the bonds, are only ancillary to the *main* purpose of constructing a power plant. (Emphasis added.)

Which is it? Is it a purpose? What is the difference between an "ancillary" purpose and a "main" purpose? Are there three "ancillary" purposes and one "main" purpose for these bonds? Are these the purposes:

(1) To build a power plant?
(2) To avoid legal complications?
(3) To protect the City's financial interest?
(4) To protect the right to sell its interest in the plant?

What if the voter favored two of the four purposes? Is it possible to give an intelligent answer to such a question? What does it mean? These are questions that had to be addressed by the Austin voters. Does the majority opinion of the Court of Appeals demonstrate an understanding of the ballot language? Should they be under the obligation to fairly explain what that ballot meant in plain language, understandable by the average citizen, if they are to hold that the voters of Austin experienced a meaningful election? Why did the public officials who drafted the ballot choose not to submit the

question in the traditional manner asking simply whether the voter favored the "main" purpose, i.e., issuance of bonds to build the power plant in question?

The Court is cited to two federal cases which hold that the question of whether a ballot is so misleading as to deprive the electors of their constitutional right to vote is a justiciable controversy under the Due Process Clause and the Guaranty Clause. "The state may not mislead its voters to the extent that they do not know what they are voting for or against." *Kohler v. Tugwell*, 292 F. Supp. 978 (E.D. Louisiana 1969); *Burger v. Judge*, 364 F. Supp. 504 (W.D. Montana 1973). In neither of the two cited cases did the court determine that the voters had been misled, but they are distinguishable from the present case on the facts. In *Burger*, the court says, "Nor is it a case where the voters were misled with respect to the content or meaning of any of the issues submitted to them. The voters were *clearly* advised what they were voting for or against." (Footnote 16, p. 511.) There was certainly nothing clear about the advice given the Austin voters in the present case. Both of these cited cases involved constitutional amendment ballots. In neither case was the court dealing with anything like the language in this case, and they are cited only for the rules of law applicable.

The highest courts of several sister states have dealt with the issue on common law grounds. The rationale under federal constitutional law is the same since the interest is in providing fair, meaningful elections. This Texas opinion stands out like a sore thumb among the decisions of other state courts. Some examples are:

> "Our election laws contemplate that, when a special proposition is submitted, the ballot shall clearly state the substance of the proposition. *If* the proposition on the ballot is stated in equivocal terms, the purpose of the election is vitiated in advance." *Kansas Electric Power Co. et al v. City of Eureka*, 45 P. 2d 877 (Kansas 1935); *Board of Education of City of El Dorado v. Powers*, 51 P. 2d 421 (Kansas 1935); *Wycoff v. Board*, 370 P. 2d 138 (1962).

> "The substance of a public measure is adequately set forth if the ballot gives a fair portrayal of the chief features of the proposition in words of plain meaning, so that it can be understood by persons entitled to vote." 18 Am. Jur. §180, p. 298.
>
> "It is well settled that an official ballot will not be vitiated by the incorporation of information beyond that required by the statute. When such additional information is incorporated in the ballot, the test is whether it would tend to confuse or misinform a voter so as to affect his free choice." *Smith v. Calhoun Community Unit School District No. 40*, 157 N.E.2d 59 (Ill. 1959).

*O'Beirne v. City of Elgin*, 187 Ill. App. 581 (1914) is an interesting case closely in point. This was a bond election to provide a municipal electric light plant at a total cost of $162,000. The ballot is quoted as follows:

> If you favor Municipal Ownership Vote Yes.
> If you oppose Municipal Ownership Vote No.
> By making a cross in one square below, thus: (X).
>
> Shall Bonds or obligations of the City of Elgin for the purpose of providing funds for the purposes mentioned in the ordinance printed hereon to the amount of One Hundred and Sixty-Two Thousand Dollars ($162,000) be issued by the City Council of the City of Elgin, Illinois?

In holding the election null and void, the Illinois court said at page 585 of the opinion:

> It was not intended that public officers charged with the duty to impartially submit a question to a vote of the people should use the ballot as a vehicle for information or argument as to the motives that might influence the voter in making his choice. Such suggestions as were made on this ballot are open to

> argument. It was not for the City Council of Elgin to determine that every voter in favor of municipal ownership should vote "Yes." It is quite conceivable that there might be among the voters those who favor municipal ownership but for reasons satisfactory to themselves did not favor the bond issue in question.

In *Drummond v. City of Columbus*, 285 N.W. 109 (Nebraska 1939), a proposition was submitted to the voters at a bond election as follows:

> Shall the City of Columbus, Nebraska, construct, purchase, or otherwise acquire an electric light and power distribution system, and/or transmission lines and real and personal property needed and useful in connection therewith . . . ?

The Supreme Court of Nebraska held the ballot invalid and stated at page 113:

> The use of the symbol "and/or" upon the ballot prepared in the case at bar, led to the confusion of the voters, who were absolutely unable to determine definitely what they were voting for or against.

*Mann v. City of Artesia*, 76 P.2d 941 (New Mexico 1938) is a case closely in point. There a ballot in a bond election read as follows:

> Question submitted: Shall the City of Artesia, New Mexico, issue its negotiable coupon bonds in the sum of $30,000.00 for the purpose of erecting a municipal hospital, said bonds to be payable not more than 30 years nor less than 20 years after date of issue, and to bear interest not to exceed 5% per annum, payable semi-annually?
>
> For Municipal Hospital.....( )
> Against Municipal Hospital.....( )

Although not even raised by the contestants, the Supreme Court of New Mexico went out of its way to address the impropriety of submitting a proposition in terms that might confuse or mislead or affect the choice of the voter. The court said at page 943:

> The canvass of the election showed 163 voters for the Municipal Hospital and 39 opposed. While objection was not raised as to putting the question in form, "For Municipal Hospital" and "Against Municipal Hospital," it was an indirect method at best for securing a true expression of the electorate on the vital issue, which was "For Bonds" or "Against Bonds," the usual form of placing the question on the ballot.

The court is also cited to a law review article by Professor Charles M. Kneir in 8 DePaul Law Review 36 (1958) entitled "Misleading the Voters in Initiative and Referendum Elections in Cities." Professor Kneir's concluding sentences are appropriate here:

> "In the case of the petition, election notice or ballot, the misleading information is in a public document and thus the voter has more reason to rely upon it. In the case of campaign spoken or written words, the voter should know that he must be on guard since the individuals and groups supplying the information are interested in the outcome. The strict view taken by some courts in requiring accuracy in statements of proposals in initiative and referendum elections would seem to be desirable from the point of view of public policy. While there is hardship where courts set aside and nullify what is technically at least the

> expression of the will of the voters, it should result in more care in framing the initiative and referendum proposals in the future. It should reduce both the number of cases of misleading statements drafted with the intention of confusing the voters and obtaining a favorable vote, as well as innocent cases of careless drafting where the proposition to be voted on is not clear. The advantage from the point of view of democratic government outweighs the disadvantage of holding another election where the proposal submitted is not clear and there is a doubt as to whether the will of the voters has been expressed at the polls.

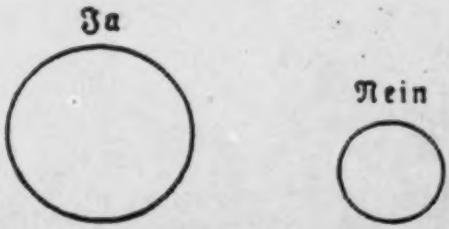
It is important in the present case that the objectionable language is not capable of being understood by the average voter. What can be more ambiguous and unclear than the term: "avoid legal complications"? Does that mean that a negative vote will throw the City into a costly lawsuit? Does it mean the City will have to pay some lawyers enormous legal fees? One thing is for certain. *Everyone* wishes to avoid legal complications whenever possible, and the drafters of this ballot were counting on that for affirmative votes on the proposition. Of course, the same is true for the remainder of the objectionable language. Most citizens want to protect their city's financial interest. It is submitted, however, that the voter could not possibly give an intelligent answer to such equivocal language.

It is important that the objectionable language is an unfair attempt by the proponents of the bonds to state on the Official Ballot reasons for a "yes" vote on the proposition. It is not for the public officials who draft the ballots to tell the voters how to vote. It is the duty of those public officials to submit the proposition in a fair, impartial manner. The official ballot must not be used as a vehicle for information and argument as to motives that might influence the voter in making a choice at the polls.

As a grim reminder of the importance of the federal question involved herein, Appellants include the following quotation from *A Book of Ballots* collected and edited by Carl O. Smith, Ph.D., Assistant Professor of Government at Wayne University, published by the Detroit Bureau of Governmental Research, Inc. in 1938.

> In the second of these plebiscites, the electorates of Germany and Austria voted on the question of Austrian union to Germany and on the list of the National Socialist Party. The election was conducted under the authority and the supervision of the German government. A free translation of the ballot proposition follows: "Are you agreed with reunion of Austria with the German Reich completed on March 13, 1938, and do you vote for the list of our leader, Adolph Hitler?"(at xii)

The ballot in that plebiscite (at page 40) offered the voters the following choice:




Simply stated, if public officials are allowed to experiment with the use of equivocal language, threatening references, multifarious questions, and the like, then they will be limited only by their imaginations in dreaming of ingenious ways to influence the outcome of what are supposed to be free elections. The voters are insulted and the process becomes a mockery.

## CONCLUSION

The Court should note probable jurisdiction of this cause and ultimately should reverse the judgment of the Court of Appeals and render judgment declaring the ordinance and the election held pursuant thereto null and void as repugnant to the Constitution of the United States.

DATED: February 10, 1984

Respectfully submitted,

JONATHON H. SMITH
Attorney for Appellants

## APPENDIX A

IN THE COURT OF APPEALS,
THIRD SUPREME JUDICIAL DISTRICT OF TEXAS,
AT AUSTIN

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No. 13,983

NEIL E. BISCHOFF, ET AL.,

vs.

CITY OF AUSTIN,

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FROM THE DISTRICT COURT OF TRAVIS COUNTY,
126TH JUDICIAL DISTRICT NO. 345,898,
HONORABLE PETE LOWRY, JUDGE PRESIDING

Neil Bischoff and others, appellants, seek to set aside a judgement of the district court of Travis County declaring the validity of a City of Austin bond election. This Court will affirm the judgment.

The parties stipulated the facts. The City of Austin is one of four participants in a project to construct a nuclear power plant known as the "South Texas Project." The Austin City Council passed an ordinance calling for an election to be held for the authorization to issue combined utility systems revenue bonds relating to financing the City's participation in the South Texas Project. Pursuant to that ordinance a bond election was set for January 15, 1983, for the purpose of submitting to the electorate the following proposition:

PROPOSITION NUMBER 1

"SHALL the City Council of the City of Austin, Texas, be authorized to issue revenue bonds of said City in the amount of NINETY-SEVEN MILLION DOLLARS ($97,000,000) maturing serially in such

installments as may be fixed by the City Council, the maximum maturity being not more than FORTY (40) years from their date, to be issued and sold at any price or prices and to bear interest at any rate or rates as shall be determined within the discretion of the City Council at the time of issuance, for the purpose of extending and improving the City's Electric Light and Power System (continued financing through March, 1984, of the City's participation in the South Texas Project to avoid legal complications and to protect the City's financial interest, including the right to sell its interest therein); to be issued in accordance with and in the manner provided in Article 1111 et seq., V.A.T.C.S., and secured by a pledge of the net revenues from the operation of the City's Electric Light and Power System and Waterworks and Sewer System, each bond to be conditioned that the holder thereof shall never have the right to demand payment of said obligation out of funds raised or to be raised by taxation?"

On January 15, 1983, the City conducted the election at which the electors were asked to vote "FOR" or "AGAINST" the single proposition which appeared on the official ballot in the following terms:

PROPOSITION NUMBER 1

THE ISSUANCE OF $97,000,000 REVENUE BONDS FOR ELECTRIC LIGHT AND POWER SYSTEM EXTENSIONS AND IMPROVEMENTS CONTINUED FINANCING THROUGH MARCH, 1984, OF THE CITY'S PARTICIPATION IN THE SOUTH TEXAS PROJECT TO AVOID LEGAL COMPLICATIONS AND TO PROTECT THE CITY'S FINANCIAL INTEREST, INCLUDING THE RIGHT TO SELL ITS INTEREST THEREIN).

Appellants' basic complaint on appeal concerns the manner in which the proposition was described on the official ballot. By three points of error, appellants assert the district court erred in declaring the bond election valid because, as a matter of law, the language on the ballot did not submit the proposition in a fair and impartial manner; because such language was ambiguous, unclear, and misleading; and because such language failed to state a specific question to be answered by the voters. Specifically, appellants argue that the language, "to avoid legal complications and to protect the city's financial interest including the right to sell its interest therein," should have been omitted. Appellants contend that the statement of the proposition on the ballot amounted to an argument to the voters to vote for the bonds by informing them that if they wanted to avoid legal complications and protect the city's interest, they should vote for the bonds. There were various other alternatives to a bond referendum, urge appellants, about which the voters were not informed. Accordingly, appellants contend the language on the ballot was inaccurate and misleading in that it made it appear that the bond vote was the only way to avoid legal complications. This Court will overrule the points of error.

In passing, it should be observed that this is not a case where appellants pleaded or attempted to prove that the alleged irregularity in the wording of the ballot proposition affected or changed the results of the election; or where appellants pleaded or attempted to prove fraudulent conduct by city officials in the choice of language for the ballot.

In general, the form of a ballot proposition to be submitted to the voters of a city is prescribed by municipal authority unless such form is governed by statute, city charter, or ordinance. Tex. Elec. Code Ann. art. 6.07 (Supp. 1982). The parties to this appeal agree that no statute, charter provision, or ordinance sets out a form for such a ballot proposition. Under these circumstances, as this Court understands, the framing of the statement of the proposition on the ballot was properly left to the discretion of the municipal authorities. Tex. Elec. Code Ann. art. 6.07 (Supp. 1982), such discretion being limited only by the common law requirement that the

statement describe the proposition with such definiteness and certainty that the voters will not be misled. *See Moore v. City of Corpus Christi*, 542 S.W.2d 720 (Tex. Civ. App. 1976, writ ref'd n.r.e.); *Turner v. Lewie*, 201 S.W.2d 86 (Tex. Civ. App. 1947, writ dism'd).

Appellants have not directed our attention, nor have we been able to discover, any Texas authority holding invalid a ballot because it contains *too much* language describing the proposition. The usual case involves contentions that the ballot contains *too little* descriptive language. *See Hill v. Evans*, 414 S.W.2d 684 (Tex. Civ. App. 1967, writ ref'd n.r.e.); *Turner v. Lewie, supra*.

The parenthetical language appearing on the ballot served to explain the phrase "electric light and power system extensions and improvements," and was not tantamount to an argument to voters to vote in favor of the bonds. Although the parenthetical language perhaps could have been omitted, the law encourages, rather than frowns upon, a full and definite statement of the purpose of a proposition. *Moore v. Coffman*, 200 S.W. 374 (Tex. 1918).

It is presumed that voters will familiarize themselves with the contents of, and the statements in, the propositions before casting their ballots; otherwise, the legislature would have required a verbatim copy of the proposition on the ballot. *Moore v. City of Corpus Christi, supra*; *Hill v. Evans, supra*. That being so, a ballot which directs the attention of the voter to a particular amendment or proposition with which he is presumed to be familiar is sufficient. *Hill v. Evans, supra*.

The statement of the proposition appearing on the ballot mirrors the language of the full proposition. This Court has concluded that the ballot submitted the proposition to be voted on with sufficient definiteness and certainty that the voters would not be misled. *Moore v. City of Corpus Christi, supra*. Accordingly, it cannot be said that, as a matter of law, the selection of the language to be placed on the ballot constituted an abuse of discretion by the municipal officials.

Appellants' fourth point of error is that the district court erred in upholding the validity of the election because the proposition purports to authorize the issuance of revenue bonds for purposes not authorized by statute or the city charter. Texas Rev. Civ. Stat. Ann. art 1111 (1963) provides that cities shall have power to issue bonds to build, purchase, improve, extend, and repair certain public facilities, including an electric plant. Appellants argue that the purpose of these bonds was to avoid legal problems and to preserve the city's interest in the South Texas Project. The point of error is without merit because avoiding legal complications and preserving the city's interest in the project, if indeed purposes of the bonds, are only ancillary to the main purpose of constructing a power plant.

Appellants' fifth point is that the language on the ballot was misleading to the extent that it constitutes a violation of the rights of the voters protected by Article IV and the Fourteenth Amendment to the Constitution of the United States. This contention was not raised in appellant's trial pleading.[1] Contentions raised for the first time on appeal are not properly before the appellate court. *Gray-Taylor, Inc. v. Tennessee*, 587 S.W.2d 668 (Tex. 1979).

Should the claimed error not be considered waived, this Court holds that there was no constitutional violation because the ballot submitted the proposition with sufficient definiteness and certainty so that the voters could not have been misled.

The judgment is affirmed.

Bob Shannon, Justice

[Before Justices Shannon, Smith and Brady;
Justice Brady not participating]
Affirmed
Filed: July 13, 1983

[1] In a supplemental transcript filed after submission and oral argument in this Court, it is seen that this contention was urged only after entry of judgment by an instrument denominated "Motion to Vacate Judgment."

## APPENDIX B

NO. 345,898

| | | |
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| EX PARTE | ) | IN THE DISTRICT COURT |
| | ) | 126TH JUDICIAL DISTRICT |
| CITY OF AUSTIN | ) | TRAVIS COUNTY, TEXAS |

### JUDGMENT

On the 11th of April, 1983, came on to be heard at the proper time and in due order, the above styled and numbered cause, a declaratory judgment action concerning the validity of certain securities, brought pursuant to Article 717m–1, *V.A.T.C.S.*, the same having been, by Order dated April 5, 1983, consolidated for all purposes with an election contest action styled Neil E. Bischoff, et al. v. Carole Keeton McClellan docketed in Cause No. 344,715

But for the Attorney General of the State of Texas, no property owner, taxpayer, citizen, or person affected by or interested in the proceedings, or the issuance of the securities identified as $70,000,000 "City of Austin, Texas, Combined Utility Systems Revenue Bonds, Series 1983" pled in opposition to the City of Austin's Petition for declaratory judgment.

There appeared before the Court the following:

1. The City of Austin, Texas, and the City Council of the City of Austin, Texas, in their official capacities, all by the City Attorney, Albert DeLaRosa;
2. The Attorney General of the State of Texas, in his official capacity, by Assistant Attorney General Robert T. Lewis; and
3. The Contestants in the aforesaid Election Contest: Neil E. Bischoff, Joseph M. Riddell, III, David Soileau, David Weir, and Mark A. Zuefeldt, by their Attorney of Record, Jonathon Smith.

By consent of all parties present there was first presented to the Court for consideration the Motion to Dismiss filed in Cause No. 345,898 by the Attorney General of the State of Texas, who by written pleading admitted all requisite notice and opportunity for examination required by Art. 717m-1, *V.A.T.C.S.* The Attorney General further alleged and stated that he does not question the validity of the City of Austin's Petition and argument, and consequently does not question the validity of the proceedings, or the identified securities, or the security or the provisions for the payment thereof, all as set forth in the City of Austin's Petition and other documents pertaining to this Cause and the Attorney General requested he be dismissed as a party.

There being no objection to the Attorney General's Motion to Dismiss, and it appearing to the Court that said Motion should be granted, the Court granted the Attorney General's Motion to Dismiss, to which Order reference is made for all purposes.

No issue having been raised other than the validity of the ballot proposition submitted to the voters of the City of Austin in the January 15, 1983 election for bonds, the Court proceeded to hearing and trial on that matter put into controversy by the Contestants' First Amended Original Petition and Notice of Election Contest filed in Cause No. 344,715.

The Court read all of the pleadings of the parties, reviewed the stipulated evidence before it, and considered the arguments and briefs presented by both sides. Based upon the foregoing, it is

ORDERED, ADJUDGED and DECREED as follows:

1. All objections of Neil E. Bischoff, Joseph M. Riddell, III, David Soileau, David Weir, and Mark A. Zuefeldt to the ballot proposition submitted to the voters of the City of Austin in the January 15, 1983 election for bonds are overruled; all relief requested by said Contestants is denied.

2. The City of Austin, Texas, is a legally organized, established and existing Home Rule municipal corporation under the provisions of the constitution and law of the State of Texas.

3. The City of Austin is authorized to issue and deliver the securities identified as $70,000,000 "City of Austin, Texas, Combined Utility Systems Revenue Bonds, Series 1983".

4. The legality and validity of all proceedings, including all actions and expenditures of funds, taken or made and/or proposed to be taken or made in connection with or affecting the aforesaid securities, including the validity of the January 15, 1983 election for bonds at which said securities were authorized, and confirmed.

5. When issued and delivered to the purchaser thereof, said $70,000,000 "City of Austin, Texas, Combined Utility Systems Revenue Bonds, Series 1983", shall constitute lawful and valid obligations of the City of Austin, enforceable according to their respective terms; and all provisions for the payment(s) of said securities are validated and confirmed.

6. If no appeal is taken from this Judgment, or if taken and this Judgment is affirmed, this Judgment shall, as to all matters adjudicated, or which could have been raised in the proceedings, be forever binding and conclusive against the City of Austin, the Attorney General, the Comptroller of Public Accounts, and all parties to the cause, whether mentioned in and served with the notice of the proceedings, or included in the description, "all taxpayers, property owners, and residents, if any, of the City of Austin, and all nonresidents, if any, owning property therein, and all others having or claiming any right, title, or interest in any properties or funds to be affected by the proceedings and/or the issuance of the securities, or interested or affected in any way thereby, or by the proceedings, including all actions and expenditures of funds, taken or made and/or proposed to be taken or made in connection with or affecting the securities", and shall constitute a permanent injunction against the institution by

any person or entity of any action or proceedings contesting the validity of the proceedings and/or securities described in the Petition of the City of Austin, or the validity of provisions made for the payment of the same, or of interest thereon, or any matters adjudicated by this Judgment, or which could have been raised in the proceedings.

7. This Court's Judgment and Decree shall be recorded in the same manner as other decrees or judgments in Travis County, Texas.

8. The City of Austin and the five (5) individual parties named herein, shall each bear and are hereby taxed their own costs.

SIGNED this the 18th day of April, 1983.

Pete Lowry
Judge Presiding

## APPENDIX C

May 11, 1983

Mr. Jonathan Davis
Assistant City Attorney
P.O. Box 1088
Austin, Texas 78767-8828

Mr. Jonathan Smith
Attorney at Law
502 West 14th Street
Austin, Texas 78701

Re: Cause No. 345,898; Ex Parte City of Austin

Gentlemen:

Enclosed is a copy of the Findings of Fact and Conclusions of Law that I have signed today in the above referenced case.

Sincerely yours,

PETE LOWRY
Judge, 261st District Court
Travis County, Texas

345,898

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| EX PARTE | ) | IN THE DISTRICT COURT |
| | ) | 126TH JUDICIAL DISTRICT |
| CITY OF AUSTIN | ) | TRAVIS COUNTY, TEXAS |

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, in response to a request from Respondents, makes its findings of fact and conclusions of law in the above referenced case as follows:

## FINDINGS OF FACT

1. The City Council of the City of Austin, Texas, on the 16th day of December, 1982, duly passed on first, second, and third readings respectively, Ordinance No. 821216–I of the City of Austin, Texas, entitled:

> AN ORDINANCE BY THE CITY COUNCIL OF THE CITY OF AUSTIN, TEXAS, CALLING A BOND ELECTION TO BE HELD IN SAID CITY FOR THE AUTHORIZATION OF REVENUE BONDS, MAKING PROVISION FOR THE CONDUCT OF THE ELECTION AND OTHER PROVISIONS INCIDENT AND RELATED TO THE PURPOSE OF THIS ORDINANCE: SUSPENDING THE RULE REQUIRING THAT ORDINANCES BE READ ON THREE SEPARATE DAYS; AND DECLARING AN EMERGENCY.

2. Under said Ordinance No. 821216–I of the City of Austin, Texas, there was called a bond election for the 15th day of January, 1983, for the purpose of submitting to the resident, qualified electors of the City of Austin the following proposition, to-wit:

### PROPOSITION NUMBER 1

"SHALL the City Council of the City of Austin, Texas, be authorized to issue revenue bonds of said City in the amount of NINETY-SEVEN MILLION DOLLARS ($97,000,000) maturing serially in such installments as may be fixed by the City Council, the maximum maturity being not more than FORTY (40) years from their date, to be issued and sold at any price or prices and to bear interest at any rate or rates as shall be determined within the discretion of the City Council at the time of issuance, for the purpose of extending and improving the City's Electric Light and Power System (continued financing through March, 1984, of the City's participation in the South Texas Project to avoid legal

complications and to protect the City's financial interest, including the right to sell its interest therein); to be issued in accordance with and in the manner provided in Article 1111 et seq., V.A.T.C.S., and secured by a pledge of the net revenues from the operation of the City's Electric Light and Power System and Waterworks and Sewer System, each bond to be conditioned that the holder thereof shall never have the right to demand payment of said obligation out of funds raised or to be raised by taxation?"

3. Notice of said election was given and accomplished by the following conduct, actions and instruments, to-wit:

(a) By the posting of a substantial copy of Ordinance No. 821216–I, including a Spanish translation thereof, at three (3) public places in the City of Austin, Texas, and at the City Hall in the City of Austin, Texas, not less than fourteen (14) full days prior to the date on which said election was to be held.

(b) By the publication of a substantial copy of said Ordinance No. 821216–I, in the "Austin American–Statesman," a newspaper of general circulation in, and published in the City of Austin, Travis County, Texas, on December 29, 1982, and January 5, 1983.

4. The dates of all such posting of notice as aforesaid, and the date of the first publication as aforesaid were both not less than fourteen (14) full days prior to the date of the election.

5. All such notices, as both posted and as published, were respectively posted and published in both the English and Spanish languages.

6. Said election was held at the time and places prescribed by said Ordinance No. 821216–I of the City of Austin, Texas, the ordinance calling said election.

7. The date of the election was not less than fifteen (15) nor more than ninety (90) days from the date when Ordinance No. 821216–I of the City of Austin was adopted.

8. The election was open to all resident qualified electors of the City of Austin, Texas.

9. At said election for bonds, the single ballot proposition submitted to the voters read as follows:

> [FOR OR AGAINST]
> "THE ISSUANCE OF $97,000,000 REVENUE BONDS FOR ELECTRIC LIGHT AND POWER SYSTEM EXTENSIONS AND IMPROVEMENTS (CONTINUED FINANCING THROUGH MARCH, 1984, OF THE CITY'S PARTICIPATION IN THE SOUTH TEXAS PROJECT TO AVOID LEGAL COMPLICATIONS AND TO PROTECT THE CITY'S FINANCIAL INTEREST, INCLUDING THE RIGHT TO SELL ITS INTEREST THEREIN)."

10. On the 17th day of January, 1983, the City Council of the City of Austin, Texas, duly convened in special session for consideration of a Resolution entitled:

> "A Resolution by the City Council of the City of Austin, Texas Canvassing Returns and Declaring the Result of a Bond Election Held in said City on the 15th day of January, 1983."

11. After due and appropriate consideration said Resolution was duly passed on such date.

12. Said Resolution passed on the 17th day of January, 1983, by the City Council of the City of Austin, Texas, as aforesaid, canvassed the returns and declared the results of said bond election under the proposition submitted as follows, to-wit:

PROPOSITION NUMBER 1
"THE ISSUANCE OF $97,000,000 REVENUE BONDS FOR ELECTRIC LIGHT AND POWER SYSTEM EXTENSIONS AND IMPROVEMENTS (CONTINUED FINANCING THROUGH MARCH, 1984, OF THE CITY'S PARTICIPATION IN THE SOUTH TEXAS PROJECT TO AVOID LEGAL COMPLICATIONS AND TO PROTECT THE CITY'S FINANCIAL INTEREST, INCLUDING THE RIGHT TO SELL ITS INTEREST THEREIN)

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| FOR | 14,514 votes |
| AGAINST | 4,543 votes |
| TOTAL VOTES CAST | 19,057 votes |

13. It was accordingly found and determined by said Resolution that a majority of the resident qualified electors voting at the election voted in favor of such proposition submitted and voted on at said election.

## CONCLUSIONS OF LAW

1. That the $70,000,000 "City of Austin, Texas, Combined Utility Systems Revenue Bonds, Series 1983" which form the subject matter of this Cause are to be issued for improvements and purposes within the authority of the statutes of the State of Texas, the Charter of the City of Austin, Texas, and consistent with the Constitution of the State of Texas.

2. The January 15, 1983, election for bonds conducted by the City of Austin, including the ballot proposition submitted to the electorate was, in all things, valid.

3. The City of Austin is entitled to the relief for which it prayed, namely, a permanent injunction against any proceedings pending or hereafter instituted, which challenge the validity of the $70,000,000 "City of Austin, Texas, Combined Utility Systems Revenue Bonds, Series 1983," its right to

issue same, or in any manner hindering the issuance and delivery thereof; in the absence of such relief, the City of Austin would suffer and endure irreparable injury for which there is no adequate remedy at law.

Any conclusion of law hereinabove made which also constitutes a finding of fact is adopted as a finding of fact.

SIGNED this 11th day of May, 1983.

PETE LOWRY
Judge Presiding

## APPENDIX D

IN THE COURT OF APPEALS,
THIRD SUPREME JUDICIAL DISTRICT OF TEXAS,
AT AUSTIN

JUDGMENT RENDERED JULY 13, 1983

13,983 - NEIL E. BISCHOFF, ET AL. V. CITY OF AUSTIN
APPEAL FROM 126TH DISTRICT COURT OF
TRAVIS COUNTY

Before Justices Shannon, Smith and Brady; Justice Brady not participating

AFFIRMED - Opinion by Justice Shannon

THIS CAUSE came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was no error in the trial court's judgment: IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and same is hereby in all things affirmed. It is FURTHER ordered that appellants, pay all costs in this behalf expended and that the cash deposit made in the trial court in lieu of an appeal bond be subjected to and used for the payment of such costs, and that this decision be certified below for observance.

## APPENDIX E

COURT OF APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS AT AUSTIN

No. 13983

Neil E. Bischoff, et al

vs.

City of Austin

Date: 9/7/83

Appellants' Motion for Rehearing submitted and overruled. (Mo. #18,550)

## APPENDIX F

NO. C-2447 — October 19, 1983

NEIL E. BISCHOFF ET AL. vs. CITY OF AUSTIN — From Travis County, Third District

Application of petitioners for writ of error to the Court of Appeals for the Third Supreme Judicial District, together with the joint motion to expedite appeal having been duly considered, it is ordered that the motion to expedite be, and hereby is granted, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, Neil E. Bischoff et al., pay all costs incurred on this application.

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NO. C-2447 — November 16, 1983

NEIL E. BISCHOFF ET AL. vs CITY OF AUSTIN — From Travis County, Third District.

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

## APPENDIX G

THIRD COURT OF APPEALS
RECEIVED
MRS. MARGIE LOVE, CLERK
FEB 9, 1984

NO. 13,983

| | |
|---|---|
| NEIL E. BISCHOFF, ET AL., *Appellants*, V. CITY OF AUSTIN, *Appellee* | IN THE COURT OF APPEALS THIRD SUPREME JUDICIAL DISTRICT AT AUSTIN, TEXAS |

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Neil E. Bischoff, Joseph M. Riddell, III, David Soileau, David Weir, and Mark Zuefeldt, Appellants hereby appeal to the Supreme Court of the United States the judgment of this Court of Appeals entered on July 13, 1983, affirming the judgment of the trial court.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Respectfully submitted,
JONATHON H. SMITH
P. O. Box 50034
Austin, Texas 78763
(512) 480-8971
By. _____
Jonathon H. Smith
State Bar No. 18631000
ATTORNEY FOR APPELLANTS

## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Notice of Appeal was hand-delivered to the offices of the City Attorney of the City of Austin, Texas, by the undersigned attorney on the 9th day of February, 1984. The attorney of record for the City of Austin is Jonathan Davis, Brown Building, 708 Colorado Street, Austin, Texas 78701. All parties required to be served herewith have been served.

Jonathon H. Smith

APPENDIX H

NO. 344,715

| | |
|---|---|
| NEIL E. BISCHOFF, ET AL., Contestants, V. | IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS |
| CAROLE KEETON McCLELLAN, Contestee. | 53 JUDICIAL DISTRICT |

FIRST AMENDED ORIGINAL PETITION
AND
NOTICE OF ELECTION CONTEST AND
STATEMENT OF GROUNDS OF CONTEST

TO: Carole Keeton McClellan, Contestee, and the Honorable Judge of said District Court of Travis County, Texas:

NOW COME Neil E. Bischoff, Donna Sue Martin, Margery Ogden, Joseph M. Riddell, III, David Soileau, David Weir, and Mark A. Zuefeldt, Contestants herein, in accordance with Article 9.03 of the Election Code and give this written notice to Carole Keeton McClellan, Mayor of the City of Austin, Travis County, Texas, the official designated as Contestee under the provisions of the Election Code, Article 9.31.

Contestants state that they intend to, and do hereby, contest the election held on January 15, 1983, in the City of Austin which resulted in the approval of the following proposition as submitted to the voters:

> THE ISSUANCE OF $97,000,000 REVENUE BONDS FOR ELECTRIC LIGHT AND POWER SYSTEM EXTENSIONS AND IMPROVEMENTS (CONTINUED FINANCING THROUGH MARCH 1984 OF THE CITY'S PARTICIPATION IN THE

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SOUTH TEXAS PROJECT TO AVOID LEGAL COMPLICATIONS AND TO PROTECT THE CITY'S FINANCIAL INTEREST, INCLUDING THE RIGHT TO SELL ITS INTEREST THEREIN).

In compliance with said Election Code, Contestants give the following statement of grounds for this contest:

I.

Contestants are, and were at the time of the election referred to, duly qualified voters residing in the City of Austin, Travis County, Texas, users of the electric light and power system therein, and fully qualified to bring this election contest.

II.

Contestee is, and was at the time pertinent hereto, the duly elected mayor of said City.

III.

On January 15, 1983, a special election was held in the City of Austin to consider a bond proposal put forward by the City Council to issue $97,000,000 in revenue bonds for the obscurely worded purpose quoted above. The voters were informed that the purpose of the bonds would be "to avoid legal complications," "to protect the City's financial interest," and to protect its "right to sell its interest therein." At the election more voters cast votes FOR these vague, obscure, general, uncertain, ambiguous, and unfairly stated purposes than AGAINST them.

IV.

On January 17, 1983, the results of said election were canvassed by the City Council and the official result thereof was declared. According to the announced results, the issuance of the bonds was approved by the majority of votes cast.

V.

It is fundamental to our system of government that a ballot must set forth a public measure by giving a fair portrayal of the chief features of the proposal in words of plain meaning so that it can be understood by persons entitled to vote. The question submitted must be specific and must be free from ambiguity and uncertainty and must not be misleading. It is the duty of public officials to impartially submit a question to the vote of the people. The ballot should not become a vehicle for information or argument as to motives that might influence the voter in making a choice.

VI.

The ballot used in the election of January 15, 1983, was insufficient and invalid for the reason that it did not state the question to be voted on with definiteness and certainty.

VII.

The ballot used in the election of January 15, 1983, was insufficient and invalid in that it did not fairly state the measure to be voted on by the electorate.

VIII.

The ballot used in the election of January 15, 1983, was insufficient and invalid for the reason that it was submitted in such form as to amount to an argument in favor of its acceptance.

IX.

The ballot used in the election of January 15, 1983, was invalid in that it failed to submit a specific question to the voters.

X.

The ballot used in the election of January 15, 1983, was misleading and confusing.

XI.

According to Article 8.27 of the Election Code, it is unlawful for any person to do any electioneering within 100 feet of any door to a polling place. The ballot used in the election of January 15, 1983, amounted to unlawful electioneering by the proponets of the bonds within the very sacred confines of the voting booth by means of a document labeled "Official Ballot" which must necessarily influence the choice of the voter. The ballot should never be used in such an unfair manner and for such purposes.

XII.

For approximately two weeks preceding the election of January 15, 1983, certain groups, including certain city officials, actively campaigned and advertised in the media in favor of the proposed bonds. The major themes of the political campaigning centered around various supposed legal complications and considerations, the spectre of a threat to the financial interests of the City, and possible effects on the City's right to sell its interest in the South Texas Nuclear Project. It is apparent that the ballot in question was drafted so as to bring these political arguments to the attention of the voter as he or she cast his or her vote so as to influence the voter to approve the bonds. It is the position of Contestants that many of the claims made by the bond proponents in the campaign were exaggerated and misleading. Regardless of that, however, the inclusion of such arguments constitutes an unlawful use of the ballot and a defect of substance which necessarily voids the election.

XIII.

The proposition as stated on the ballot was multifarious in that it stated improperly several different purposes together so as to prevent the voter from an opportunity to select among the purposes. The result was to attract the votes of people of various interests in order to secure the approval of a bond issue that might otherwise have failed.

XIV.

The purposes stated as "to avoid legal complications" and "to protect the City's financial interest," and to protect "the right to sell its interest," in the South Texas Project are impermissible purposes for the issuance of revenue bonds and outside the legal authority of the City. Pursuant to such language, proceeds from the bonds may be intended for legal fees, other expenses of litigation, other outstanding obligations of the City, expenses and fees associated with a sale of the interest in the Project, as well as innumerable other uses which may be related to such vague and uncertain purposes. The discretion in the council would be practically unlimited.

WHEREFORE, PREMISES CONSIDERED, Contestants pray that after trial herein, for the reason of the errors and deficiencies in the ballot recited above, the Court declare the election of January 15, 1983, to be null and void.

Respectfully submitted,

Jonathon H. Smith
3311 Bonnie Road
Austin, Texas 78703
(512) 480-8971
State Bar No. 18631000
ATTORNEY FOR
CONTESTANTS

CERTIFICATE OF SERVICE

This is to certify that the foregoing Petition was hand delivered to counsel for contestee on the 28th day of February, 1983.

Jonathon H. Smith
Attorney for Contestants

## APPENDIX I

5 May 1983

Judge Pete Lowry
Travis County Courthouse
P.O. Box 1748
Austin, TX 78767

Re: Ex Parte City of Austin
No. 345,898

Dear Judge Lowry:

In response to the proposed Findings and Conclusions forwarded to you by The City Attorney by cover letter dated May 3, 1983, please consider the following:

1. The first 25 "findings" covering some 5 legal-size pages, are in no sense of the word "findings" but more recitations about the filing of pleadings, motions, documents, stipulations, and the entry of orders and judgment in the cause all of which come from the papers filed in the two cases but *none* of which were offered into evidence at trial. They are not proper findings in the case.

2. There was *no* evidence offered at trial to support findings 38-49.

3. Only findings 25-37 are legitimate findings related to this lawsuit and supported by the stipulated evidence.

4. Actually, only finding #33 is necessary to the resolution of this case.

5. Likewise only two of the proposed Conclusions of Law are applicable to a resolution of this case and they are woefully inadequate to set forth the legal theory on which this case was decided. See Conclusions 7 and 8.

6. Conclusion 7 says we did not show by the evidence we were entitled to a temporary injunction, *which we never sought at any time.* Apparently the City Attorney thinks we had a temporary injunction hearing. I was under the impression we had a trial on the merits. If I am mistaken, the final judgment should certainly be set aside so that we can proceed to a trial on the merits. This conclusion conflicts with the judgment entered!

7. Conclusion 8, the only other conclusion dealing with the merits of the dispute merely recites that the ballot was valid. Surely we are entitled to more than that. We asserted the language of the ballot was invalid for the following reasons:

a) it is ambiguous
b) it is not a specific question
c) it is not impartially stated
d) it is misleading

We are entitled to a conclusion of law as to each theory asserted or on some defensive theory.

This failure to present to the court a set of conclusions which constitute a legal basis for the judgment of the court illustrates once again the weakness of The City's position. They never have argued to you in any way that the offensive language they used is not ambiguous. Why not? Because that position is insupportable. The phrase "to avoid legal complications" is about as ambiguous as you can get. Judge, the other side has not had the gall to even offer to you an explanation of the meaning of that language. They have simply taken the position that "we are city hall and we can do as we please" – without a shred of legal authority to back them up.

If the ballot proposition had read: "Do you favor the issuance of $97,000,000 in revenue bonds to prevent the moon from falling out of the sky?" it would have made as much sense to the voter. The City Attorney's case would have been exactly the same as it is now. It is submitted that the public officials would have as much chance to prevent the moon's falling as to "avoid legal complications" as this very case well illustrates.

Judge, for your consideration I am enclosing a copy of a federal opinion in Burger v. Judge, 364F.Supp.504 (1973) wherein a 3-judge panel holds at 508 and 511 (underlined) that "the state may not mislead its voters to the extent they do not know what they are voting for or against" and that right is protected by the Constitution of the United States. It is not too late to change your mind and set aside this judgment and enter judgment in accordance with the law presented to you in our favor. Pursuant to Rule 329b your plenary jurisdiction extends until 30 days after judgment (April 18) or until 30 days after any motion for new trial or motion to set aside judgment has been overruled *regardless* of whether an appeal has been perfected. I urge you to do so. The City has repeatedly failed to demonstrate a Legal theory upon which the offensive language of this ballot can be upheld.

I challenge the City to demonstrate that the language "to avoid legal complications" is not legally ambiguous. To do so, I challenge The City to give the Court a plausible meaning that the Austin voters can understand and act on. If they cannot do even that, Judge, surely we are entitled to our judgment as prayed.

Judge, I am in no way trying to belabor these points or to delay the proceedings. This letter is in response to what strikes me as an absurd set of proposed Findings and Conclusions which I believe demonstrate the City's weak legal position. Rule 296 allows a request for Findings and Conclusions for a good reason. The rule allows the Court an opportunity to see in writing the reasoning and legal theory that the prevailing party urges in support of the judgment. Where the position is unsound, the Court has an opportunity to correct it.

I also attach a brief Motion to Set Aside Judgment in this Cause in order to protect the Court's plenary jurisdiction to reconsider this matter. An appeal bond is on file and your consideration will in no way interfere with or prolong an appeal. Should the Court grant our Motion to set aside

Judgment, I will be happy to draft a judgment with good and sufficient findings and conclusions to support a judgment in favor of my clients.

Thank you for your consideration and patience in this matter.

Sincerely,

Jonathon H. Smith

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No. 345,898

| | | |
|---|---|---|
| EX PARTE | ) | IN THE DISTRICT COURT |
| | ) | 126TH JUDICIAL DISTRICT |
| CITY OF AUSTIN | ) | TRAVIS COUNTY, TEXAS |

MOTION TO VACATE JUDGMENT

Come Now Neil Bischoff, Joseph Riddell III, David Weir, David Soileau, and Mark Zuefeldt, and move the court to set aside and vacate the judgment entered herein on April 18, 1983, for the reason that the proposition submitted by the ballot in question is:

1) ambiguous and unclear
2) not a specific question
3) not impartially stated
4) misleading
5) violates the Due Process Clause of the 14th Amendment, Section 1 and the Guaranty Clause, Art IV, Section 4 of the Constitution of the United States of America as well as the Voting Right Act, 42 U.S.C.A. 1973.

Respectfully Submitted,

Jonathon H. Smith
Attorney at Law

FILED
1983 MAY-6 PM 3:54
John Dickson
DISTRICT CLERK
TRAVIS COUNTY, TEXAS

# APPENDIX J

May 9, 1983

Judge Pete Lowry
261st District Court
Travis County Courthouse
Austin, Texas 78701

Re: Cause No. 345,898
Ex Parte: City of Austin

Dear Judge Lowry:

In response to the letter to you from Jonathon Smith dated 5 May (a copy of which is attached for reference) the following comments are offered:

1. While not admitting that *all* of the Findings 1–25 are not proper, the City notes that some were included for potential benefit to the Court of Appeals. The sequence of events which led to the judgment being appealed from is not easily understood from the case file(s); therefore, it was included in the proposed findings. We do not think that the inclusion of Findings 1–25 would be error.

2. It should be noted that no one, other than the Attorney General, pled to the City's Petition in Cause No. 345,898. There being no party disputing the City's pleading, there was no need to present evidence supporting each specific paragraph in the City's Petition. However, the stipulated evidence *does* support Findings 38–47; and the election contest lawsuit itself is evidence of Findings 48 and 49, even if the Court can't take judicial notice of them.

3. The City doesn't agree with the whole of Mr. Smith's statement; however, he doesn't seem to be challenging the inclusion of Findings 25–37.

4. The City doesn't agree with Mr. Smith's statement; however, he doesn't seem to be challenging the inclusion of Finding 33.

5. With regard to the alleged inadequacy of the Conclusions, the City does not agree with Mr. Smith's statement that only two of them are applicable to a resolution of this case. An examination of the Statute, the City's Petition and the Stipulation submitted to the Court should show their validity.

6. Conclusion 7 is taken from Sec. 8 of Art. 717m-1, V.A.T.C.S., relating to the bond required of persons opposing a lawsuit brought pursuant to the statute. Because the city agreed not to request such a bond, conclusion 7 may be deleted or not approved, whichever is preferable to the Court. Attached please find two new pages which may be substituted to the document submitted to you last week.

7. Attached please find two (2) appellate decisions which discuss the sufficiency of Conclusions of law; the salient portions have been "highlighted" for your convenience. The city is of the opinion that the proposed Conclusions, except as has been noted, satisfy Rule 296, T.R.C.P.

Thank you for your consideration. If we may provide any assistance to the Court, please advise.

Sincerely,

Jonathan Davis
First Assistant City Attorney